

TITLE 10. CALIFORNIA DEPARTMENT OF REAL ESTATE

CITATION & FINE IMPLEMENTATION BUSINESS & PROFESSIONS CODE SECTION 10080.9

NOTICE IS HEREBY GIVEN

The Commissioner ("Commissioner") of the Department of Real Estate ("Department") proposes to adopt the proposed regulations below after considering all comments, objections, and recommendations regarding the proposed action.

AUTHORITY AND REFERENCE

Section 10080 of the Business and Professions Code ("the Code") authorizes the Commissioner to adopt regulations that are reasonably necessary for the enforcement of the provisions of the Real Estate Law (Code Sections 10000 et. seq.). This proposal is designed to implement, interpret, and make specific Code Section 10080.9, which went into effect on January 1, 2012. The proposed regulatory sections also reference Code Sections 10106, 10130, 10166.02, 10167.2, and 10177; and Government Code Sections 8311 and 11505.

PUBLIC HEARING

The Department has not scheduled a public hearing on this proposed action. However, the Department will hold a hearing if it receives a written request for a public hearing from any interested person, or his or her authorized representative, no later than 15 days before the close of the written comment period.

WRITTEN COMMENT PERIOD

Any interested person, or his or her authorized representative, may submit written comments relevant to the proposed regulatory action to the Commissioner addressed as follows:

Regular Mail

Department of Real Estate
Attn: Daniel E. Kehew, Sacramento Legal Office
2201 Broadway
Sacramento, CA 95818

Electronic Mail

DRERegulations@dre.ca.gov

Facsimile

(916) 227-9458

Comments may be submitted until 5:00 p.m., Monday, July 1, 2013.

INFORMATIVE DIGEST/PLAIN ENGLISH OVERVIEW: ISSUES COMMON TO THE ENTIRE PROPOSAL

These sections address the need to implement, interpret, and make specific the provisions of Section 10080.9 of the Code. That statutory section authorizes the Department to issue Citations and Fines as part of its disciplinary spectrum. The

Commissioner proposes to add Sections 2907.1, 2907.2, 2907.3, and 2907.4 within Chapter 6, Title 10 of the California Code of Regulations (“Regulations”).

DETERMINATION OF CONSISTENCY/COMPATIBILITY WITH EXISTING STATE REGULATIONS

The Commissioner has determined that these proposed regulations are not inconsistent or incompatible with existing regulations. After conducting a review for any regulations that would relate to or affect this area, the Commissioner has concluded that these are the only regulations relating to issuance of citations and associated fines to real estate licensees in California.

INFORMATIVE DIGEST/PLAIN ENGLISH OVERVIEW: ADOPTION OF SECTION 2907.1

This section addresses the need to implement and make specific the provisions of Section 10080.9 of the Code. That statutory section does not describe (1) details regarding citation processing from issuance through correction of the violation(s) and (2) the specific requirements imposed upon a person or entity cited that, if not met, may result in further disciplinary action.

PURPOSE, BENEFITS, AND GOALS OF SECTION 2907.1

This section is designed to describe, in chronological order, the basic process for issuance of a citation and correction of the violations described in a given citation. The regulation promotes fairness of process through provision of a “roadmap” to a licensee or non-licensee subject to a citation regarding the standard for the process and his/her/its responsibility to respond to a citation. The regulation also provides a standard for use by the Department and administrative law judges when gauging whether a respondent has responded adequately to issuance of a citation.

By subdivision, the section sets out:

- (a) The scope of discipline.
- (b) The range of entities that may be subject to such discipline.
- (c) The nature of a citation document itself and the information it must provide to the respondent.
- (d) The minimum standard for service of a citation.
- (e) The time allowed to comply with a citation’s order.
- (f) An allowance for extension of the time to comply for good cause.

NECESSITY OF SECTION 2907.1

This section offers the basic rules regarding citations that render any disciplinary matter enforceable – the “who, what, when, where, and how,” without which a person or entity subject to discipline may attempt to challenge the Department’s action as unfair or arbitrarily enforced.

INFORMATIVE DIGEST/PLAIN ENGLISH OVERVIEW:

ADOPTION OF SECTION 2907.2

This section addresses the need to implement and make specific the provisions of Section 10080.9 of the Code. In particular, that statutory section does not describe considerations involved in application of this level of discipline or setting the amount of an administrative fine for the violation(s) described in a citation. Although the statute describes a maximum amount to be assessed in a given fine, that language does not clearly address the possible compounding of fines. Department staff understand that such compounding was not the author's intent with regard to licensee discipline (as opposed to citations issued to unlicensed persons), and the proposed regulation addresses that issue.

PURPOSE, BENEFITS, AND GOALS OF SECTION 2907.2

Subdivision by subdivision, this section is designed to:

- (a) Set out the factors involved in gauging the seriousness of the licensee's violation or violations that may result in application of citation and the setting of a fine, dependent on the facts and circumstances of the violation.
- (b) Clarify that where there are multiple violations involved in the same Departmental investigation of a licensee, yet the totality of the offenses does not warrant more substantive disciplinary action (specifically, filing of an Accusation), only a single citation shall issue with a maximum of \$2,500 assessed.
- (c) Set out the additional factors involved when an unlicensed person or entity engages in activity requiring a license that may result in the increase of a fine above the minimum amount, depending on the facts and circumstances of the violation.

NECESSITY OF SECTION 2907.2

Functioning much like the "Criteria for Rehabilitation" that appear in Section 2911 and 2912 of the Regulations, this section offers guidance regarding those factors that will be considered when establishing the relative seriousness, and therefore cost to the violator, of the offenses subject to citation. Absent such a set of criteria, a person (or entity) subject to this level of discipline may attempt to challenge the Department's action as unfair or arbitrarily enforced. However, such criteria allow needed flexibility (within the very limited confines of a \$0 to \$2,500 penalty range) to deal with the wide variety of facts and circumstances that may occur in any particular violation.

INFORMATIVE DIGEST/PLAIN ENGLISH OVERVIEW:

ADOPTION OF SECTION 2907.3

This section addresses the need to implement and make specific the provisions of Section 10080.9 of the Code. In particular, that statutory section does not describe the appeal process that a person or entity may follow to challenge the issued citation or level of fine assessed. Although a hearing process under the Government Code is referenced by the statute and does function as the standard "due process" for

challenges to Department actions, that process carries expenses to both the Department and respondent that are disproportionate to the level of discipline and fine amounts described in Section 10080.9 of the Code.

PURPOSE, BENEFITS, AND GOALS OF SECTION 2907.3

The section sets out the aspects of a citation that are subject to challenge via this process. This section also describes, in chronological order, the due process for appeal of a citation and/or fine. In doing so, the regulation provides two opportunities to challenge the discipline. The first is an informal conference with a person designated by the Commissioner for this role, designed to keep the appeal process for this low level of discipline economically efficient for both the respondent and the Department. The second is the formal hearing process applicable to all discipline matters.

NECESSITY OF SECTION 2907.3

Respondents must have a means to challenge governmental decisions, such as the issuance of a citation or imposition of a certain level of fine; this is basic, Constitutional “due process.” The formal hearing needed to resolve a disputed Accusation, however, is an expensive proposition. See the cost analysis describing the formal hearing process, provided with the Economic and Fiscal Impact Statement (“STD. 399”) relating to Section 2907.3, enclosed with this regulations package.

Up to 2012, the Department absorbed the cost of such disciplinary actions. With the adoption of Section 10106 of the Code, the Department now has the ability to request reimbursement from a respondent for some of the Department’s expenses in preparing for a hearing. Yet other Departmental costs, such as the expenses charged to the Department by the Office of Administrative Hearings, are not reimbursable. On the other side of the disciplinary dispute, even where such a reimbursement request is not made, the respondent licensee or unlicensed person faces costs in terms of preparation, legal representation, and lost work time when attending a formal hearing.

Where the dispute between the respondent and Department regards a fine of \$2,500 or less, such an expensive “due process” option should be a last resort, rather than a first resort, for the sake of both the respondent and the Department.

INFORMATIVE DIGEST/PLAIN ENGLISH OVERVIEW: ADOPTION OF SECTION 2907.4

This section addresses the need to implement and make specific the provisions of Section 10080.9 of the Code. In particular, that statutory section does not describe the time frame for completion of payment for an assessed fine.

PURPOSE, BENEFITS, AND GOALS OF SECTION 2907.4

This section sets out the time frame for payment of an administrative fine, depending (as appropriate) upon whether a citation and/or fine is subject to appeal and the length of the appeal process. This section also reinforces the statute’s requirement

regarding a person (or corporate entity) who fails to pay an assessed fine or otherwise fails to comply with the terms of a citation.

NECESSITY OF SECTION 2907.4

Section 10080.9 of the Code is silent regarding standards for timing of compliance with the penalties assessed via citation. This section sets out a reasonable, justifiable, and enforceable standard for compliance regarding payment of fines.

AVAILABILITY OF MODIFIED TEXT

The text of any modified regulation, unless the modification is only non-substantial or solely grammatical in nature, will be made available to the public at least 15 days prior to the date the Department adopts the regulation(s). A request for a copy of any modified regulation(s) should be addressed to the contact person designated below. The Commissioner will accept written comments on the modified regulation(s) for 15 days after the date on which they are made available. The Commissioner may thereafter adopt, amend or repeal the foregoing proposal substantially as set forth above without further notice.

AVAILABILITY OF STATEMENT OF REASONS, TEXT OF PROPOSED REGULATIONS/INTERNET ACCESS

The express terms of the proposed action may be obtained upon request from the Sacramento offices of the Department. An initial statement of reasons for the proposed action containing all the information upon which the proposal is based is available from the contact person designated below. These documents are also available at the Department's website at www.dre.ca.gov. As required by the Administrative Procedure Act, the Department's Sacramento Legal Office maintains the rulemaking file. The rulemaking file is available for public inspection at the Department of Real Estate, 2201 Broadway, Sacramento, California.

AVAILABILITY OF THE FINAL STATEMENT OF REASONS

Upon its completion, the Final Statement of Reasons will be available and copies may be requested from the contact person named in this notice or may be accessed on the website listed above.

CONSIDERATION OF ALTERNATIVES

In accordance with Government Code section 11346.5, subdivision (a)(13), the Department must determine that no reasonable alternative it considered, or that has otherwise been identified and brought to the attention of the Department, would be more effective in carrying out the purpose for which the action is proposed, would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

RESULTS OF THE ECONOMIC IMPACT ANALYSIS/ASSESSMENT (Pursuant to Government Code Section 11346.3(b))

The Department has conducted an Economic Impact Assessment, and that

document is relied upon in reaching these results:

- The proposal does not significantly affect the creation or elimination of jobs within the State of California.
- The proposal does not significantly affect the creation of new businesses or the elimination of existing businesses within the State of California.
- The proposal does not significantly affect the expansion of businesses currently doing business within the State of California.
- The proposal will not adversely affect the health and welfare of California residents, worker safety, or the State's environment. By implementing, interpreting, and clarifying this new level of discipline within the spectrum of disciplinary actions available to the Department, the proposal will benefit the general welfare of California residents by ensuring that licensees and unlicensed persons abide by the Real Estate Law and the protections that law affords the public.

INITIAL DETERMINATIONS

The Commissioner has made an initial determination that the proposed regulatory action:

- There may be a cost savings to the Department of Real Estate. (Statement of Determination required by Government Code section 11346.5(a)(6).)
- Does not create a cost nor impose a mandate (nondiscretionary cost or savings) on local agencies or school districts, or a mandate that is required to be reimbursed pursuant to Part 7 (commencing with Section 17500) of Division 4 of the Government Code. (Statements of Determination required by Government Code section 11346.5(a)(6).)
- Does not create a cost or savings regarding federal funding to the state. (Statement of Determination required by Government Code section 11346.5(a)(6).)
- Does not have an effect on housing costs.
- Does not have a significant statewide adverse economic impact directly affecting businesses, including the ability of California businesses to compete with businesses in other states.

COST IMPACTS ON REPRESENTATIVE PRIVATE PERSON OR BUSINESS

The Department has determined that there may be a modest cost savings, when compared to the expense of full license discipline process, to individuals (including corporate licensees) who have committed minor or technical violations of the Real Estate Law.

EFFECT ON SMALL BUSINESS

The Department has determined that there may be a modest cost savings, when compared to the expense of full license discipline process, to individuals (including small businesses) who have committed minor or technical violations of the Real Estate Law.

CONTACT PERSON

Inquiries concerning this action may be directed to Daniel Kehew at (916) 227-0425, or via email at DRERegulations@dre.ca.gov. The backup contact person is Mary Clarke at (916) 227-0780.

Dated: May 7, 2013
Sacramento, California

Daniel E. Kehew
Real Estate Counsel
Sacramento Legal Office